

SUE HALL, Clerk of Court
Filed
05/13/2011

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

JUDGE: DONNA J GRIMSLEY

CASE NUMBER: S0100CR201000047

STATE OF ARIZONA, PLAINTIFF

CLERK'S AFFIDAVIT OF MAILING

VS

ROBERTS, JOSEPH DOUGLAS, DEFENDANT

I hereby certify that copies of the following document(s) were distributed to all parties indicated below on May 13, 2011.

Amended Index of Record

Copies have been distributed to:

ARIZONA COURT OF APPEALS CRIMINAL APPEALS [HC]
DIVISION ONE
1501 WEST WASHINGTON
PHOENIX, AZ 85007

APACHE COUNTY ATTORNEY'S OFFICE [EM]

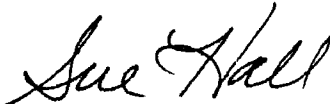
DAVID JOHN MARTIN [EM]

BETTY SMITH COURT ADMINISTRATOR [EM]
APACHE COUNTY SUPERIOR COURT

COUNTY ATTORNEY, APPEALS BUREAU [HC]
3131 W DURANGO, 2ND FLOOR
PHOENIX, AZ 85009

IN WITNESS WHEREOF I have hereunto set my hand and the official seal of this Court, this May 13, 2011.

SUE HALL, CLERK OF THE SUPERIOR COURT



BY: AMP, Deputy Clerk

Clerk of the Superior Court - Apache County
CR 201000047
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65		ORDER: Order		Attached
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68	3/22/2011	MOTION: Reconsideration		Attached
69	3/24/2011	ORDER: Denying	ORDER DENYING THE MOTION	Attached
		CERTIFICATE: Clerk's Certificate of		
70	3/28/2011	Record on Appeal		Attached

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71	3/28/2011	REQUEST: Request		Attached
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73	5/13/2011	AFFIDAVIT	Clerk's Affidavit of mailing	Attached

SUE HALL, Clerk of Court
Filed
02/09/2011

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

JUDGE: DONNA J GRIMSLEY, PRESIDING
JUDGE
CASE NUMBER: S0100CR201000047

DATE: FEBRUARY 10, 2011

STATE OF ARIZONA, PLAINTIFF

VS

JOSEPH DOUGLAS ROBERTS, DEFENDANT

NOTICE OF MAILING NOTICE OF APPEAL

A NOTICE OF APPEAL FROM SUPERIOR COURT has been filed the 9TH day of February, 2011. Copies have been mailed to the following:

ARIZONA COURT OF APPEALS CRIMINAL APPEALS [HC]
DIVISION ONE
1501 WEST WASHINGTON
PHOENIX, AZ 85007

BETTY SMITH COURT ADMINISTRATOR [EM]
APACHE COUNTY SUPERIOR COURT
PO BOX 667
SAINT JOHNS, AZ 85936-0667

STATE ATTORNEY GENERAL'S OFFICE [HC]
CRIMINAL APPEALS
1275 WEST WASHINGTON
PHOENIX, AZ 85007

JEFF TRUDIGIAN, DEPUTY COUNTY ATTORNEY [HC]
MARICOPA COUNTY ATTORNEY'S OFFICE
3131 W. DURANGO ST., SUITE 200
PHOENIX, AZ 85009

DAVID JOHN MARTIN [EM]

IN WITNESS WHEREOF I have hereunto set my hand and the official seal of this Court, this February 10, 2011.

SUE HALL, CLERK OF THE SUPERIOR COURT



BY: AMP, Deputy Clerk

SUE HALL, Clerk of Court
Filed
02/10/2011

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

JUDGE: DONNA J GRIMSLEY

DATE: FEBRUARY 10, 2011

CASE NUMBER: S0100CR201000047

ARIZONA COURT OF APPEALS CRIMINAL APPEALS
[HC]
DIVISION ONE
1501 WEST WASHINGTON
PHOENIX, AZ 85007

STATE OF ARIZONA, PLAINTIFF

VS

STATE ATTORNEY GENERAL'S OFFICE [HC]
CRIMINAL APPEALS
1275 WEST WASHINGTON
PHOENIX, AZ 85007

ROBERTS, JOSEPH DOUGLAS, DEFENDANT

DAVID JOHN MARTIN [EM]

JEFF TRUDIGIAN, DEPUTY COUNTY ATTORNEY [HC]
MARICOPA COUNTY ATTORNEY'S OFFICE
3131 W. DURANGO ST., SUITE 200
PHOENIX, AZ 85009

COURT ADMINISTRATOR, APACHE COUNTY
SUPERIOR COURT [EM]

TRANSMITTAL OF RECORD ON APPEAL

I, SUE HALL, Clerk of the Superior Court of Apache County, State of Arizona, hereby certify the instruments transmitted are true and complete photocopies, in the above-entitled and numbered cause.

AND I CERTIFY the instruments transmitted are complete photo copies of the original instruments filed and entered of record in this matter and all thereof deemed necessary to present this cause on appeal to the Court of Appeals, Division One, of the State of Arizona.

Appellant was represented at time of Sentencing by:

- ☒ Court appointed Counsel
☐ Private Counsel
☐ Propria Persona

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court of Apache County, Arizona, February 10, 2011.

SUE HALL, CLERK OF THE SUPERIOR COURT



BY: AMP, Deputy Clerk

Attch: Case File Index

Digital Recording Operator is the Deputy Clerk

Case File Copy
Transcripts done prior to Appeal

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FILED *BA*
DOCKETED BY: *BA*

2011 FEB 17 AM 11:28

SUE HALL, CLERK
APACHE COUNTY SUPERIOR COURT

SET	
<ul style="list-style-type: none">■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.■ Print your name and address on the reverse so that we can return the card to you.■ Attach this card to the back of the mailpiece, or on the front if space permits. <p>1. Article Addressed to:</p> <p>Arizona Court of Appeals Criminal Appeals Division One 601 W. Washington Phoenix, AZ 85007</p>	<p>A. Signature <input checked="" type="checkbox"/> <i>[Signature]</i> <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <i>TAN CARR</i></p> <p>C. Date of Delivery <i>2/14/11</i></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>
	<p>3. Service Type</p> <p><input type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>
	<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
	<p>2. Article Number (Transfer from service label)</p> <p>7004 1350 0005 3253 6545</p>
<p>PS Form 3811, February 2004 Domestic Return Receipt 10000-02-000-1040</p>	

02/17/2011 11:14:47

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2011 MAR 16 AM 11:46
SUE HALL, CLERK
APACHE COUNTY SUPERIOR COURT

SUE HALL, CLERK
PAPACHE COUNTY SUPERIOR COURT

IN AND FOR THE COUNTY OF APACHE

(Honorable Donna J. Grimsley)

The dismissal with prejudice in this case fails to account for the interests of the victims' need for justice. The Court should reconsider the dismissal with prejudice in order to account for these interests. Further, the interests of justice demand that the Ruling be reconsidered because

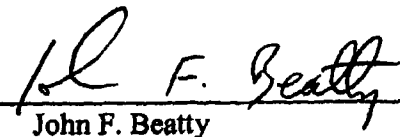
of new evidence obtained by the State.

This Court retains jurisdiction over this issue. *State v. Johnson*, 113 Ariz. 506, 557 P.2d 1063 (Ariz. 1976).

This Motion is supported by the attached Memorandum of Points and Authorities.

Submitted March 14, 2011.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY 
John F. Beatty
Deputy Maricopa County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

A. Prima Facie Case

Pursuant to defendant's motion to dismiss, filed February 26, 2010, the Court received evidence and testimony and heard argument on September 27, 2010, November 10, 2010, and December 3, 2010, and issued a ruling on January 18, 2011, that resulted in a dismissal of the case with prejudice. In order for the defendant to establish a *prima facie* case and succeed in his claim, the defendant had to show that there was a violation of his rights by the alleged acts of the State. *See*, Rule 16.2(b), Ariz.R.Crim.Proc., and *State v. Mieg*, 225 Ariz. 445, 239 P.3d 1258 (Ariz.App. 2010). Further, the Court had to then find that the violation caused prejudice to the defendant, and that the violation caused the defendant to lose confidence in all lawyers. *See*, *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009); *U.S. v. Morrison*, 449 U.S. 361, 101 S.Ct. 665 (1981).

When he testified on November 10, 2010, the defendant made statements to the effect

that the jail visit of February 4 caused him to mistrust his lawyer and all other potential lawyers. These statements mirrored comments from the Court during the hearing on September 27, 2010, regarding what was necessary to grant the relief requested. The Court relied on the defendant's statements when deciding this issue, as set forth in the January 18, 2011, ruling. However, evidence subsequently obtained by the State reveals the defendant deliberately misled the Court in a calculated effort to accomplish a dismissal of the case. Furthermore, since the defendant had not claimed prior to the hearings that he had no confidence in attorneys, the State was unaware of the need to seek evidence to rebut the defendant's claims, which again mirrored what the Court relayed during the hearing of September 27, 2010.

B. Jail Calls

The evidence that the State has recently obtained consists of recordings of the defendant's jail calls. None of the recordings received by undersigned counsel included legal calls; the calls were made by the defendant to family and/or friends. There are easily over 250 recordings, many of which are 15 minutes long. The review of the voluminous calls is still ongoing, but they are obviously replete with statements by the defendant regarding his continuing trust of his attorney and admiration for the work his attorney was doing. These statements show that he lied and misled the Court when he testified in the evidentiary hearing. The recordings also clearly show that he knew and was fully aware of what he needed to say to the Court in an effort to secure a favorable ruling and to get a dismissal of the charges. Furthermore, they clearly demonstrate the continuing relationship between the defendant and his attorney.

Of particular note when considering the evidence from the jail tapes is the Court's factual findings regarding the defendant's testimony and the avowals of defense counsel that provided the Court with a basis for its ruling. *See*, Court Order entered January 18, 2011, at p. 2. When

comparing the testimony and avowals with the defendant's actual frame of mind as clearly demonstrated in the jail tapes, it is evident that the Court did not have true information to rely upon in making the necessary determinations to support the ruling entered.

The jail calls described below are a sampling of the entire jail-call recordings. Transcripts have not been prepared for the calls, so the descriptions below are paraphrases. At times, the defendant used vulgar language, and therefore when that language is used, those phrases will be quoted.

The defendant was taken into custody at the end of September 2009. There were no recordings for September or October 2009. Starting with the calls in November 2009, which was about three months prior to the jail visit and preliminary hearing, the defendant immediately started complaining about his lawyer. This is important because it illustrates, *prior to* the February 4 jail visit, his prevailing attitude toward his lawyer and toward all lawyers which then changed to a positive attitude leading up to the hearing of November 10, 2010.

On November 16, 2009, he says he has not talked to his "piece of shit" lawyer in two and a half weeks.

On November 20, he says "My lawyer's not fighting for me, he's never going to; I don't have any other options for a 'fucking' lawyer." Soon after this statement, the woman he is talking to says he has a right to get another lawyer, to which he responds that he is not going to ask for another lawyer because his attorney is "going to do at least a little more than anyone else would." He expresses his thought that all of the lawyers on the list of available lawyers are related to the County Attorney in some way.

On December 13, he expresses that he feels his lawyer is not on his side, and he complains about his lawyer.

On December 18, he wants to change his lawyer.

On December 30, he says he needs a new lawyer but there isn't one for him.

On January 27, 2010, he says he spoke to his lawyer and scheduled an appointment.

On February 1, he says he talked to his lawyer who gave him bad news. He said his lawyer told him the plea deal from the County Attorney was "25 years." He also says that his attorney is not going to do anything. He later says that the County Attorney sent over a deal saying that he'll get 25 years if he waives the preliminary hearing. He says he told his lawyer to go "fuck himself." When talking about the defendant's video-taped confession, he tells the woman he was talking to that he did *not* say the taped confession was a lie. He also says that the State "does not have to prove shit since I told them everything I did." He says his attorney told him there was only a "2% chance of winning" this case if the defendant went into court and told the jury he was not telling the truth when he talked to the police. Then he says "That's exactly what I'm going to do because during the interview I told them exactly what they wanted to hear." Later, he says that even if he loses after trial he "is getting 25 to life, so what's the point in taking 25 'fucking' years when that is what I am already going to get." He says his attorney told him the jury will not believe him if he tells the jury that he lied when he talked to the cops.

On February 2, he says he spent the night in the law library and so now he is going to "hit" his lawyer. He says that "they are trying to get him to plead down to first degree murder and stealing a car, 25 years in prison." Importantly, this is nearly identical to what Investigator Hounshell told him was the plea offer two days later. He later says his attorney asked him if he wanted to make a counter offer for something less than 19 years. He calls his lawyer a "stupid fucker" and he says he threw the paper at the attorney and told him to "shove that paper up Michael Whiting's asshole." Michael Whiting was the elected Apache County Attorney at the

time of the call, and he still is. The defendant says he can't get a different lawyer because there are no other lawyers. He says his lawyer, whom he identifies by the name of David Martin, is "pro bono on this case and that's why he's being a complete lazy douche-bag." He again expresses how this lawyer is bad, just like all other lawyers, but none would be better for him. He says it is common knowledge in the jail among the inmates that all of the court-appointed lawyers will try to get an inmate to plead because they "don't want to have to 'fucking fight'." He ends the call saying that "tomorrow morning I am going to give him everything I found in the library and my testimony and I am going to shove it down his throat."

On February 3, he said his lawyer came again to visit with him, and he told his lawyer to "shove all the plea bargains up his ass." He says his lawyer told him that if he does not take a deal, the State will try to scare them with the death penalty. Importantly, this statement regarding being threatened with the death penalty *predated* Hounshell's visit by only one day and actually served to prepare the defendant for Hounshell's statements as to the plea offer and to the consequences if the plea were not accepted.

As the Court is aware, Investigators Hounshell and Jaramillo visited the defendant in jail on February 4, 2010.

On February 4, *after* the investigators visit the defendant in jail, the defendant says that he thinks he is making the State sweat and the State is trying to turn it back on him because they're scared and his lawyer has actually "been coming up with some pretty good shit lately." Further, the defendant states, "I'm not going to fire him after all." He praises his lawyer and says his lawyer said that a lot of what the defendant gave the lawyer was helpful, and some was not, but either way he can work with it.

As the Court is aware, the preliminary hearing started on February 5, 2010. On that date,

after the hearing, the defendant made another call in which he again praised the work of his lawyer and talked of the cooperation between the lawyer and the defendant. He said his lawyer "tore the State's ass apart" and made the State "look like a dumbass" and "we're getting somewhere now" and "all in all he is alright today" and the defendant is not going to fire the lawyer after all.

On February 7, and February 9, the defendant again praised the work of his lawyer, characterizing his attorney's performance as "he stomped on them pretty good" and "my lawyer jumped on his throat."

The statements in the calls continue in this vein, talking of cooperation with his lawyer.

The pre-evidentiary hearing was on September 27, 2010. The defendant was present, and the parties and the Court addressed the issue of what was required for a *prima facie* case. Prior to this date, the jail calls do not appear to reflect that the defendant said that he mistrusted all lawyers as a result of the February 4 jail visit. As stated above, not all calls have yet been reviewed.

However, on October 11, two weeks after the September 27 hearing, the defendant talked to a woman on the telephone and described to her the purpose of the next hearing. He says that "that's what this entire next hearing is about ... whether or not [Hounshell's actions] impacted the case badly enough that [the Judge] either has to get me a new attorney or whether or not my confidence in attorneys would be shattered enough that she wouldn't be able to do that, in which case a dismissal would be the most reasonable and sound decision to make." Not surprisingly, four weeks later he testified under oath, effectively, that his confidence in all attorneys is shattered. He also talks about multiple discussions he has had with the lawyer and about a possible insanity plea. He also says that his lawyer is treating him this way because the lawyer

has other clients “who are paying clients, unlike me.”

The evidentiary hearing was then held on November 10, 2010. After the hearing, he spoke to a woman and made several statements about the hearing, often referring to “his” lawyer and saying that his lawyer “called the cop” who arrested his wife. He described the experience with phrases like “we ripped them a pretty good asshole today,” and “we’ll see how bad that rip will be,” and “my lawyer is coming back to go over some shit,” and “according to my lawyer, I did very well.”

On November 18, he cooperated with his lawyer when they talked to the State Bar regarding Michael Whiting of the Apache County Attorney’s Office.

On December 2, he refers to talking to his lawyer on the phone and awaiting paperwork from him.

On December 5, he talks of how he and his lawyer are ready to file a Motion for Change of Judge.

On December 8, he talks about how he has cooperated with his lawyer. Also, he describes his lawyer’s perceptions on the performance of undersigned counsel at the closing arguments.

C. Victims’ Rights

Pursuant to the Arizona Constitution, Article 2, §2.1(A), crime victims in Arizona have a right to justice and due process. Additionally, victims have a right “[t]o have all rules governing criminal procedure . . . protect victims’ rights.” Ariz. Con. Article 2, §2.1(A) (11). Accordingly, when considering whether a dismissal of charges with prejudice serves the interests of justice, *see* 16.6(d), Ariz. R. Crim. Pro., the crime victim’s right to justice must also be considered. The State is confident that, upon reconsideration, the Court will give all interests involved, including

the crime victims', due weight and determine that a dismissal with prejudice is not in the interests of justice.

D. Other Issues

The State previously argued several points during this litigation that the Court does not seem to have addressed in the January 18 Ruling. The Court should reconsider the Ruling in order to address these issues. During the litigation of this matter, the State previously filed several documents describing each of the issues. To avoid unnecessary repetition, the State incorporates herein by reference the State's Response to Defendant's Motion to Dismiss, the State's Memorandum Re Hearing on Motion to Remand, and the State's Response to Defendant's Motion for Review of Preliminary Hearing. Briefly, the issues raised by the State are found in four separate areas.

First, regarding the existence of a violation, the State argued there is a distinction in the law between an intrusion and a violation. The State has argued that the intrusion was not a violation of the defendant's 6th Amendment Rights. This argument is based in part on the fact that the hearing should not have been structured and styled after the case of *State v. Warner*, 150 Ariz. 123, 722 P.2d 291 (1986), and certainly the standards found in *Warner* should not have applied to this case. *Warner* was not appropriate as the basis for the hearing because that case was factually and legally distinct from the case at bar. The State argued that the recent case of *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009), was more clearly on point factually and legally than *Warner*. This Court did not address these arguments in the Ruling.

Second, regarding a *prima facie* case, the State argued that the defendant was required to make a *prima facie* case before the Court could begin to try to find a remedy for the acts of the State's investigators. The State cited to the recent case of *State v. Mieg*, 225 Ariz. 445, 239 P.3d

1258 (Ariz.App. 2010), which overturned a lower court decision after proceeding without the defense having made a *prima facie* case. The State argued throughout the litigation that the defendant had not established such a preliminary case. At the September 27 hearing, the parties and the Court engaged in a lively discussion about the issue of a *prima facie* case, saying specifically that the defendant would first be required to show he had lost confidence in all attorneys *because of* the actions of the investigators. At the following hearing, the defendant conveniently came armed with this information (as cited above in the October 11, 2010, telephone call) and he told the Court exactly what he thought needed to be said. This testimony undermined the Court's ability to fairly evaluate the true state of the relationship between the defendant and his attorney, let alone the defendant's true disposition towards attorneys in general.

Third, even without the jail tapes, the State previously argued that the defendant was not a trustworthy witness. The Court did not address the issue of the defendant's trustworthiness in the Ruling. With the jail calls, we know now that the defendant lied to the Court. The defendant is willing to say whatever it takes while in Court, as he said he did when he was in his original police interview (he said as much in the February 1, 2010, call, described above). Further, his calls are overflowing with comments about his attorney's work, reflecting his true mindset as described above. But the October 11 call shows that he knew what was at stake and what he needed to say, which he then parroted back to the Court at the next opportunity. The calls do not reflect a change in the defendant from before to after the jail visit regarding his feelings toward his lawyer or any other lawyer. It is that change that would begin to form an appropriate basis for a *prima facie* case.

Fourth, regarding the appropriate remedy, the State argued that the remedy in the *Warner*

case was based on the U.S. Supreme Court case of *U.S. v. Morrison*, 449 U.S. 361 (1981). The *Morrison* Court directs lower courts to impose a remedy appropriate for the circumstances. The State provided several cases as examples of appropriate remedies for acts more egregious than what occurred in case at bar. This Court's ruling does not address why the dismissal in this case, with prejudice, fits within the legal framework of an appropriate remedy. That framework clearly indicates that the appropriate remedy is to suppress the existence and content of the February 4 visit. Because the Ruling does not address this issue and the other issues set forth above, the Court should reconsider the Ruling to reflect consideration of all the issues attendant to the murder case before it.

E. Arguments

By any reading of the case law on the issue of defendant's relationship with his attorney, as described in earlier pleadings, the fact that there was an intrusion into the attorney-client relationship is merely a threshold question. The next question has to be the establishment of a *prima facie* case by showing that the intrusion was an actual violation of the defendant's rights. Only at that point can the Court contemplate whether to impose a remedy, and then that remedy must be appropriate to the circumstances.

Regarding the intrusion, the Court's Ruling set forth a factual finding of an intrusion into the defendant's 6th Amendment Rights. That intrusion is based on the jail visit on February 4. That visit was recorded, and the Court has heard the recording. During the entire encounter with the investigators, the defendant does not make any statements that would tend to incriminate him. However, even though there is nothing of consequence that is suppressible from that February 4 contact, case law is clear that the most severe appropriate remedy in a situation like this is to suppress the existence and content of the contact. Whether or not the contact reaped

any information does not change the fact that case law instructs us that suppression is the appropriate remedy, not dismissal with prejudice.

Regarding a violation however, the Court did not address the fact that the defendant failed to make a *prima facie* case, certainly not until he had over a year to research the legal issues, talk with his lawyer and review the evidence and he had learned in Court what he needed to say in order to achieve a dismissal. The telephone records the State has recently obtained provide crucial evidence to show the Court that the defendant's negative feelings about lawyers and the criminal justice system existed months before the jail visit by the officers. The records also show that the defendant's feelings towards his lawyer actually improved as he reaped benefits from his attorney's representation. Quite simply, the defendant lied to the Court when he testified that the acts of the officers on February 4 caused him to mistrust all lawyers. The Court should reconsider the Ruling based on this important evidence and on the fact that the defendant deliberately misled this Court to obtain a favorable ruling.

Finally, the remedy handed down by the Court is deserving of review and adjustment. Dismissal with prejudice is the most extreme remedy possible in a criminal case. Given the facts and circumstances of the underlying criminal offense, dismissal with prejudice works to deny the surviving family members of the homicide victims any recourse for justice. The defendant was in regular contact with his lawyer. He was prepared prior to the officers' visit for the consequences of not taking a plea deal, including the possibility of the death penalty. His lawyer told him virtually what the plea deal was. He continued to work with and praise his lawyer even after the February 4 visit. He parroted back to the Court exactly what was discussed in open court to ensure he said the right phrases. For these reasons, the Ruling should be reconsidered so that the surviving members of the homicide victims are not deprived of any recourse for justice.

F. Conclusion

The Court should reconsider this Ruling in light of the good cause discovered in the jail calls and to address the various issues noted above.

Submitted March 14, 2011.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY 
John F. Beatty
Deputy Maricopa County Attorney

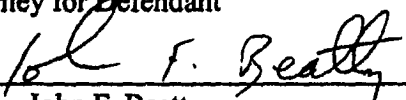
ORIGINAL mailed/delivered
March 14, 2011, to:

Clerk of the Court
Apache County Superior Court
70 W. 3rd South
St. Johns, AZ 85936

COPY mailed/delivered
March __, 2011, to:

Honorable Donna J. Grimsley
Apache County Superior Court
P.O. Box 365
St. Johns, AZ 85936
Judge of the Superior Court

David J. Martin, Esq.
P.O. Box 808
Lakeside, AZ 85929
Attorney for Defendant

BY 
John F. Beatty
Deputy Maricopa County Attorney

FILED

MAR 16 2011

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE
DONNA J. GRIMSLEY, PRESIDING JUDGE**

By Betty Smith, Court Administrator

STATE OF ARIZONA, Plaintiff(s), vs. JOSEPH DOUGLAS ROBERTS, Defendant(s).	Case No(s): S0100-CR2010-00047 Date: March 16, 2011 NOTICE
---	---

The Court is in receipt of the State's Motion to Reconsider Dismissal. A Notice of Appeal was filed by the State and the record has been transmitted to the Court of Appeals. This court no longer has jurisdiction.

The Clerk of the Court is directed to forward this filing to the Court of Appeals.

Copies to:

John F. Beatty, Deputy County Attorney [hc]
Maricopa County Attorney's Office
3131 W. Durango St., Suite 200
Phoenix, AZ 85009

David J. Martin, Esq. [em]

Clerk of the Court [em]

FILED
DOCKETED BY: 

2011 MAR 22 PM 12: 33

SUE HALL, CLERK
APACHE COUNTY SUPERIOR COURT

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

John F. Beatty
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MJC1-Homicide@mcao.maricopa.gov
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

STATE OF ARIZONA,)	
)	
Plaintiff,)	
)	
vs.)	
)	
JOSEPH DOUGLAS ROBERTS,)	CR 2010-00047
)	
Defendant.)	STATE'S MOTION TO RECONSIDER
)	FINDING OF NO JURISDICTION
)	REGARDING MOTION TO RECONSIDER
)	DISMISSAL
)	
)	(Honorable Donna J. Grimsley)

The State of Arizona, by undersigned counsel, respectfully requests this Court to reconsider the Court's finding, as set forth in the minute entry of March 16, 2011, that this Court does not have jurisdiction to address the State's Motion to Reconsider Dismissal, as set forth in the Court's ruling on January 18, 2011.

Pursuant to Rule 31.11, Arizona Rules of Criminal Procedure, this Court retains jurisdiction until 15 days *after* the record on appeal has been filed. Rule 31.11 states: "No new matter, other than a petition for post-conviction relief not precluded under Rule 32.2, may be

filed in the trial court by any party to an appeal later than 15 days after the record on appeal has been filed.”

The “record on appeal” referred to in Rule 31.11 is defined in Rule 31.10, Arizona Rules of Criminal Procedure. Specifically, Rule 31.10 describes that the clerk of the Appellate Court gives Notice that all portions of the record have been received and the record is complete. It is this Notice that marks the record on appeal. As of this writing, and certainly as of March 16, 2011, when the Motion to Reconsider Dismissal was filed, the record on appeal has yet to be filed. This Court will continue to retain jurisdiction for 15 days after that record on appeal is complete and filed.

The timeframe delineated in Rule 31.11 is specifically designed to allow the trial court time to take corrective action at the trial court level. This is explained in the Comment to Rule 31.11, which is reproduced here from Westlaw:

Perfection of an appeal is delayed to give the parties an adequate opportunity to file corrective motions in the trial court. This section delays the perfection of the appeal until the due date for the first filing which directly affects the course of the appeal and which can only be decided by the appellate court--the request to file briefs. See Rule 31.12. This gives parties who appeal about the same time to file corrective motions as they had under the former rules--about 60 days--and equalizes the time for filing motions under Rule 24.2 for those who do and those who do not appeal. Formerly, an appeal was perfected upon the filing of the notice of appeal and payment of the docketing fee. [* * *]

Perfection, under this section, merely designates to what court new matters relating to the appeal must be addressed. *It does not remove the trial court's jurisdiction to decide motions filed before the cut-off date*, or petitions for post-conviction relief based upon issues which are not raisable on appeal and were not raised in a post-trial motion. See Rule 24.2; 24.3; 32.1; 32.2. Thus, a Rule 24 motion which was filed before perfection may be decided by the trial court after perfection whether or not the appeal has been stayed under Rule 31.4(a).

The phrase “15 days after the record of appeal has been filed” refers to 15 days after the date on which the parties are notified under Rule 31.10.

16A A.R.S. Rules Crim.Proc., Rule 31.11 (emphasis added).

This Court retains jurisdiction over the State's Motion to Reconsider Dismissal because
the record on appeal has not been filed.

Submitted March 18, 2011.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY John F. Beatty
John F. Beatty
Deputy Maricopa County Attorney

ORIGINAL mailed/delivered
March 18, 2011, to:

Clerk of the Court
Apache County Superior Court
70 W. 3rd South
St. Johns, AZ 85936

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Honorable Donna J. Grimsley
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P.O. Box 365
St. Johns, AZ 85936
Judge of the Superior Court

David J. Martin, Esq.
P.O. Box 808
Lakeside, AZ 85929
Attorney for Defendant

BY John F. Beatty
John F. Beatty
Deputy Maricopa County Attorney

FILED

MAR 24 2011

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE
DONNA J. GRIMSLEY, PRESIDING JUDGE**

By Betty Smith, Court Administrator

STATE OF ARIZONA, Plaintiff(s), vs. JOSEPH DOUGLAS ROBERTS, Defendant(s).	Case No(s): S0100-CR201000047 Date: March 24, 2011
---	---

ORDER – DENYING MOTION

Upon review of State's Motion to Reconsider Finding of No Jurisdiction Regarding Motion to Reconsider Dismissal;

IT IS ORDERED denying said Motion.

Copies to:

John F. Beatty, Special Deputy County Attorney [hc]
Maricopa County Attorney's Office
301 W. Jefferson St., 4th Floor
Phoenix, AZ 85003

David J. Martin, Esq. [em]
P.O. Box 808
Lakeside, AZ 85929-0808

SUE HALL, Clerk of Court
Filed
03/28/2011

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

JUDGE: DONNA J. GRIMSLEY

BY: AMP, DEPUTY CLERK

CASE NUMBER: S0100CR201000047

START: 3/28/2011
END: 3/28/2011

STATE OF ARIZONA, PLAINTIFF

ARIZONA COURT OF APPEALS, DIVISION ONE [HC]
1501 W. WASHINGTON
PHOENIX, AZ 85007

VS

MARICOPA COUNTY ATTORNEY [MC]
ATTN: JOHN F. BEATTY
301 W. JEFFERSON ST., 4TH FLOOR
PHOENIX, AZ 85003

ROBERTS, JOSEPH DOUGLAS, DEFENDANT

DAVID J. MARIN, ESQ. [EM] ✓

CLERK'S CERTIFICATE OF RECORD TRANSMITTAL

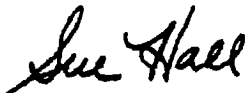
I, SUE HALL, Clerk of the Superior Court of the State of Arizona, in and for the County of Apache, do hereby certify that the enclosed documents constitute the Amended record to be transferred to:

Arizona Court of Appeals, Division One.

Amended Index of Record Attached

Witness my hand and seal of said Court affixed this March 28, 2011.

SUE HALL
CLERK OF THE APACHE COUNTY SUPERIOR COURT



By: AMP, DEPUTY CLERK

SUE HALL, Clerk of Court
Filed
03/28/2011

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

JUDGE: DONNA J. GRIMSLEY

BY: AMP, DEPUTY CLERK

CASE NUMBER: S0100CR201000047

START: 3/28/2011

END: 3/28/2011

STATE OF ARIZONA, PLAINTIFF

ARIZONA COURT OF APPEALS, DIVISION ONE [HC]
1501 W. WASHINGTON
PHOENIX, AZ 85007

VS

MARICOPA COUNTY ATTORNEY [HC]
ATTN: JOHN F. BEATTY
301 W. JEFFERSON ST, 4TH FLOOR
PHOENIX, AZ 85003

ROBERTS, JOSEPH DOUGLAS, DEFENDANT

DAVID J. MARIN, ESQ. [EM]

CLERK'S CERTIFICATE OF RECORD TRANSMITTAL

I, SUE HALL, Clerk of the Superior Court of the State of Arizona, in and for the County of Apache, do hereby certify that the enclosed documents constitute the Amended record to be transferred to:

Arizona Court of Appeals, Division One.

Amended Index of Record Attached

Witness my hand and seal of said Court affixed this March 28, 2011.

SUE HALL
CLERK OF THE APACHE COUNTY SUPERIOR COURT



By: AMP, DEPUTY CLERK

Clerk of the Superior Court - Apache County
CR 201000047
State of Arizona vs Joseph D. Roberts
Index of Record

DATE	DOCUMENT	DESCRIPTION
BUNDLE #1		
3/22/2010	CHARGING DOCUMENT: Information	
3/25/2010	CERTIFICATE: TRANSMITTAL CERTIFICATE	FROM RVJC
3/30/2010	MOTION: Change of Judge for Cause	
3/30/2010	MINUTE ENTRY: ARRAIGNMENT	
3/31/2010	ORDER: Reassignment of Judge	
4/2/2010	TRANSCRIPTS: TRANSCRIPT	
4/13/2010	MOTION: Motion	REVIEW OF PRELIMINARY HEARING
4/15/2010	MOTION: Appoint investigating Officer	
4/19/2010	ORDER: Appointing Atty/Investigator/Examiner	
4/19/2010	MOTION: STRIKE	
4/20/2010	MOTION: Extension of Time	
4/21/2010	ORDER: Extending Time	
4/29/2010	TRANSCRIPTS: TRANSCRIPT	FIRST DAY OF PRELIMINARY HEARING 2/5/10
4/30/2010	RESPONSE: TO MOTION	
BUNDLE #2		
5/3/2010	Minute Entry: Case Management Conference	
5/7/2010	RESPONSE: TO MOTION	
5/17/2010	NOTICE: Notice	
5/24/2010	MOTION: Continue	
5/28/2010	ORDER: VACATING	
6/2/2010	NOTICE: Filing Objection	NOTICE OF NO OBJECTION TO CONTINUANCE

Clerk of the Superior Court - Apache County
CR 201000047
State of Arizona vs Joseph D. Roberts
Index of Record

21	6/8/2010	Minute Entry: Case Management Conference	
22	7/19/2010	Minute Entry: Status Conference	
23	7/21/2010	NOTICE: Notice	
24	8/16/2010	Minute Entry: Status Conference	
	9/10/2010	RESPONSE: TO MOTION	FOR REVIEW OF PRELIMINARY HEARING
25			
26	9/10/2010	RESPONSE: TO MOTION	TO DISMISS
	9/27/2010	Minute Entry: Motions / Pending Matters	
27			
28	9/27/2010	MOTION: Discovery / Disclosure	
	9/27/2010	REPLY: TO RESPONSE TO MOTION	
29			
30	10/14/2010	RESPONSE: TO MOTION	
	10/18/2010	ORDER: Order	ORDER DIRECTING
31			
32	10/21/2010	NOTICE: Notice	
	10/28/2010	SUBPOENA: SUBPOENA ISSUED	
33			
	10/28/2010	SUBPOENA: SUBPOENA ISSUED	
34			
35	11/1/2010	RESPONSE: TO MOTION	
	11/5/2010	MISCELLANEOUS: Brief	BRIEF RE: THE STATE'S INTRUSION INTO THE ATTORNEY-DEFENDANT RELATIONSHIP
36			
	11/5/2010	SUBPOENA: SUBPOENA DUCES TECUM ISSUED	
37			
	11/5/2010	SUBPOENA: SUBPOENA DUCES TECUM ISSUED	
38			
	11/5/2010	SUBPOENA: SUBPOENA DUCES TECUM ISSUED	
39			
40	11/5/2010	MISCELLANEOUS: Memorandum	
	11/10/2010	Minute Entry: Motion	MOTION HEARING
41			

Clerk of the Superior Court - Apache County
CR 201000047
State of Arizona vs Joseph D. Roberts
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42	11/17/2010	ORDER: Order	ORDER CONTINUING MOTION HEARING
43	12/3/2010	NOTICE: Notice	FILING REBUTTAL EVIDENCE
44	12/3/2010	ORDER: UNDER ADVISEMENT - ISSUE	MINUTE ENTRY: UNDER ADVISEMENT
45	1/18/2011	ORDER: UNDER ADVISEMENT RULING	
46	1/19/2011	ORDER: Release Order	
47	2/8/2011	ORDER: Order	
48	2/8/2011	MISCELLANEOUS: Miscellaneous	COPY OF ENVELOPE WITH NOTICE OF APPEAL
49	2/8/2011	NOTICE: APPEAL	
50	2/9/2011	NOTICE: APPEAL	ORIGINAL NOTICE OF APPEAL
51	2/9/2011	ORDER: Order	COURT ORDER
52	2/9/2011	MISCELLANEOUS: Miscellaneous	ENVELOPE THAT CONTAINED THE ORIGINAL NOTICE OF APPEAL

AMENDED INDEX OF RECORD BUNDLE #3

53	2/10/2011	NOTICE	NOTICE OF MAILING APPEAL
54	2/10/2011	CERTIFICATE: TRANSMITTAL CERTIFICATE	TRANSMITTAL OF RECORD ON APPEAL
55	2/17/2011	CORRESPONDENCE: CERT MAIL	

Clerk of the Superior Court - Apache County
CR 201000047
State of Arizona vs Joseph D. Roberts
Index of Record

56	3/16/2011	ORDER	ATTACHED
57	3/16/2011	MOTION: RECONSIDERATION	ATTACHED
58	3/21/2011	TRANSCRIPTS: TRANSCRIPT	ALREADY SENT
59	3/21/2011	TRANSCRIPTS: TRANSCRIPT	ALREADY SENT
60	3/21/2011	MOTION: RECONSIDERATION	ATTACHED

FILED

MAR 16 2011

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE
DONNA J. GRIMSLEY, PRESIDING JUDGE**

By Betty Smith, Court Administrator

STATE OF ARIZONA, Plaintiff(s), vs. JOSEPH DOUGLAS ROBERTS, Defendant(s).	Case No(s): S0100-CR2010-00047 Date: March 16, 2011 NOTICE
--	---

The Court is in receipt of the State's Motion to Reconsider Dismissal. A Notice of Appeal was filed by the State and the record has been transmitted to the Court of Appeals. This court no longer has jurisdiction.

The Clerk of the Court is directed to forward this filing to the Court of Appeals.

Copies to:

**John F. Beatty, Deputy County Attorney [hc]
Maricopa County Attorney's Office
3131 W. Durango St., Suite 200
Phoenix, AZ 85009**

David J. Martin, Esq. [em]

Clerk of the Court [em]

**WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY**

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Phoenix, AZ 85003
MCAO Firm #: 00032000
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MJC1-Homicide@mcao.maricopa.gov
Attorney for Plaintiff**

FILED
DOCKETED BY:

2011 MAR 16 AM 11:46

**SUE HALL, CLERK
APACHE COUNTY SUPERIOR COURT**

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

STATE OF ARIZONA,

Plaintiff,

vs.

JOSEPH DOUGLAS ROBERTS,

Defendant.

CR 2010-00047

**STATE'S MOTION TO RECONSIDER
DISMISSAL**

(Honorable Donna J. Grimsley)

The State of Arizona, by undersigned counsel, respectfully requests this Court to reconsider the January 18, 2011, ruling dismissing the charges in this case with prejudice.

Pursuant to Rule 16.6(d), Arizona Rules of Criminal Procedure, dismissal of a prosecution shall be without prejudice unless the court finds that the interests of justice require dismissal with prejudice.

The dismissal with prejudice in this case fails to account for the interests of the victims' need for justice. The Court should reconsider the dismissal with prejudice in order to account for these interests. Further, the interests of justice demand that the Ruling be reconsidered because

of new evidence obtained by the State.

This Court retains jurisdiction over this issue. *State v. Johnson*, 113 Ariz. 506, 557 P.2d 1063 (Ariz. 1976).

This Motion is supported by the attached Memorandum of Points and Authorities.

Submitted March 14, 2011.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY J. F. Beatty
John F. Beatty
Deputy Maricopa County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

A. Prima Facie Case

Pursuant to defendant's motion to dismiss, filed February 26, 2010, the Court received evidence and testimony and heard argument on September 27, 2010, November 10, 2010, and December 3, 2010, and issued a ruling on January 18, 2011, that resulted in a dismissal of the case with prejudice. In order for the defendant to establish a *prima facie* case and succeed in his claim, the defendant had to show that there was a violation of his rights by the alleged acts of the State. *See*, Rule 16.2(b), Ariz.R.Crim.Proc., and *State v. Mieg*, 225 Ariz. 445, 239 P.3d 1258 (Ariz.App. 2010). Further, the Court had to then find that the violation caused prejudice to the defendant, and that the violation caused the defendant to lose confidence in all lawyers. *See*, *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009); *U.S. v. Morrison*, 449 U.S. 361, 101 S.Ct. 665 (1981).

When he testified on November 10, 2010, the defendant made statements to the effect

that the jail visit of February 4 caused him to mistrust his lawyer and all other potential lawyers. These statements mirrored comments from the Court during the hearing on September 27, 2010, regarding what was necessary to grant the relief requested. The Court relied on the defendant's statements when deciding this issue, as set forth in the January 18, 2011, ruling. However, evidence subsequently obtained by the State reveals the defendant deliberately misled the Court in a calculated effort to accomplish a dismissal of the case. Furthermore, since the defendant had not claimed prior to the hearings that he had no confidence in attorneys, the State was unaware of the need to seek evidence to rebut the defendant's claims, which again mirrored what the Court relayed during the hearing of September 27, 2010.

B. Jail Calls

The evidence that the State has recently obtained consists of recordings of the defendant's jail calls. None of the recordings received by undersigned counsel included legal calls; the calls were made by the defendant to family and/or friends. There are easily over 250 recordings, many of which are 15 minutes long. The review of the voluminous calls is still ongoing, but they are obviously replete with statements by the defendant regarding his continuing trust of his attorney and admiration for the work his attorney was doing. These statements show that he lied and misled the Court when he testified in the evidentiary hearing. The recordings also clearly show that he knew and was fully aware of what he needed to say to the Court in an effort to secure a favorable ruling and to get a dismissal of the charges. Furthermore, they clearly demonstrate the continuing relationship between the defendant and his attorney.

Of particular note when considering the evidence from the jail tapes is the Court's factual findings regarding the defendant's testimony and the avowals of defense counsel that provided the Court with a basis for its ruling. See, Court Order entered January 18, 2011, at p. 2. When

comparing the testimony and avowals with the defendant's actual frame of mind as clearly demonstrated in the jail tapes, it is evident that the Court did not have true information to rely upon in making the necessary determinations to support the ruling entered.

The jail calls described below are a sampling of the entire jail-call recordings. Transcripts have not been prepared for the calls, so the descriptions below are paraphrases. At times, the defendant used vulgar language, and therefore when that language is used, those phrases will be quoted.

The defendant was taken into custody at the end of September 2009. There were no recordings for September or October 2009. Starting with the calls in November 2009, which was about three months prior to the jail visit and preliminary hearing, the defendant immediately started complaining about his lawyer. This is important because it illustrates, *prior to* the February 4 jail visit, his prevailing attitude toward his lawyer and toward all lawyers which then changed to a positive attitude leading up to the hearing of November 10, 2010.

On November 16, 2009, he says he has not talked to his "piece of shit" lawyer in two and a half weeks.

On November 20, he says "My lawyer's not fighting for me, he's never going to; I don't have any other options for a 'fucking' lawyer." Soon after this statement, the woman he is talking to says he has a right to get another lawyer, to which he responds that he is not going to ask for another lawyer because his attorney is "going to do at least a little more than anyone else would." He expresses his thought that all of the lawyers on the list of available lawyers are related to the County Attorney in some way.

On December 13, he expresses that he feels his lawyer is not on his side, and he complains about his lawyer.

On December 18, he wants to change his lawyer.

On December 30, he says he needs a new lawyer but there isn't one for him.

On January 27, 2010, he says he spoke to his lawyer and scheduled an appointment.

On February 1, he says he talked to his lawyer who gave him bad news. He said his lawyer told him the plea deal from the County Attorney was "25 years." He also says that his attorney is not going to do anything. He later says that the County Attorney sent over a deal saying that he'll get 25 years if he waives the preliminary hearing. He says he told his lawyer to go "fuck himself." When talking about the defendant's video-taped confession, he tells the woman he was talking to that he did *not* say the taped confession was a lie. He also says that the State "does not have to prove shit since I told them everything I did." He says his attorney told him there was only a "2% chance of winning" this case if the defendant went into court and told the jury he was not telling the truth when he talked to the police. Then he says "That's exactly what I'm going to do because during the interview I told them exactly what they wanted to hear." Later, he says that even if he loses after trial he "is getting 25 to life, so what's the point in taking 25 'fucking' years when that is what I am already going to get." He says his attorney told him the jury will not believe him if he tells the jury that he lied when he talked to the cops.

On February 2, he says he spent the night in the law library and so now he is going to "hit" his lawyer. He says that "they are trying to get him to plead down to first degree murder and stealing a car, 25 years in prison." Importantly, this is nearly identical to what Investigator Hounshell told him was the plea offer two days later. He later says his attorney asked him if he wanted to make a counter offer for something less than 19 years. He calls his lawyer a "stupid fucker" and he says he threw the paper at the attorney and told him to "shove that paper up Michael Whiting's asshole." Michael Whiting was the elected Apache County Attorney at the

time of the call, and he still is. The defendant says he can't get a different lawyer because there are no other lawyers. He says his lawyer, whom he identifies by the name of David Martin, is "pro bono on this case and that's why he's being a complete lazy douche-bag." He again expresses how this lawyer is bad, just like all other lawyers, but none would be better for him. He says it is common knowledge in the jail among the inmates that all of the court-appointed lawyers will try to get an inmate to plead because they "don't want to have to 'fucking fight'." He ends the call saying that "tomorrow morning I am going to give him everything I found in the library and my testimony and I am going to shove it down his throat."

On February 3, he said his lawyer came again to visit with him, and he told his lawyer to "shove all the plea bargains up his ass." He says his lawyer told him that if he does not take a deal, the State will try to scare them with the death penalty. Importantly, this statement regarding being threatened with the death penalty *predated* Hounshell's visit by only one day and actually served to prepare the defendant for Hounshell's statements as to the plea offer and to the consequences if the plea were not accepted.

As the Court is aware, Investigators Hounshell and Jaramillo visited the defendant in jail on February 4, 2010.

On February 4, *after* the investigators visit the defendant in jail, the defendant says that he thinks he is making the State sweat and the State is trying to turn it back on him because they're scared and his lawyer has actually "been coming up with some pretty good shit lately." Further, the defendant states, "I'm not going to fire him after all." He praises his lawyer and says his lawyer said that a lot of what the defendant gave the lawyer was helpful, and some was not, but either way he can work with it.

As the Court is aware, the preliminary hearing started on February 5, 2010. On that date,

after the hearing, the defendant made another call in which he again praised the work of his lawyer and talked of the cooperation between the lawyer and the defendant. He said his lawyer "tore the State's ass apart" and made the State "look like a dumbass" and "we're getting somewhere now" and "all in all he is alright today" and the defendant is not going to fire the lawyer after all.

On February 7, and February 9, the defendant again praised the work of his lawyer, characterizing his attorney's performance as "he stomped on them pretty good" and "my lawyer jumped on his throat."

The statements in the calls continue in this vein, talking of cooperation with his lawyer.

The pre-evidentiary hearing was on September 27, 2010. The defendant was present, and the parties and the Court addressed the issue of what was required for a *prima facie* case. Prior to this date, the jail calls do not appear to reflect that the defendant said that he mistrusted all lawyers as a result of the February 4 jail visit. As stated above, not all calls have yet been reviewed.

However, on October 11, two weeks after the September 27 hearing, the defendant talked to a woman on the telephone and described to her the purpose of the next hearing. He says that "that's what this entire next hearing is about ... whether or not [Hounshell's actions] impacted the case badly enough that [the Judge] either has to get me a new attorney or whether or not my confidence in attorneys would be shattered enough that she wouldn't be able to do that, in which case a dismissal would be the most reasonable and sound decision to make." Not surprisingly, four weeks later he testified under oath, effectively, that his confidence in all attorneys is shattered. He also talks about multiple discussions he has had with the lawyer and about a possible insanity plea. He also says that his lawyer is treating him this way because the lawyer

has other clients "who are paying clients, unlike me."

The evidentiary hearing was then held on November 10, 2010. After the hearing, he spoke to a woman and made several statements about the hearing, often referring to "his" lawyer and saying that his lawyer "called the cop" who arrested his wife. He described the experience with phrases like "we ripped them a pretty good asshole today," and "we'll see how bad that rip will be," and "my lawyer is coming back to go over some shit," and "according to my lawyer, I did very well."

On November 18, he cooperated with his lawyer when they talked to the State Bar regarding Michael Whiting of the Apache County Attorney's Office.

On December 2, he refers to talking to his lawyer on the phone and awaiting paperwork from him.

On December 5, he talks of how he and his lawyer are ready to file a Motion for Change of Judge.

On December 8, he talks about how he has cooperated with his lawyer. Also, he describes his lawyer's perceptions on the performance of undersigned counsel at the closing arguments.

C. Victims' Rights

Pursuant to the Arizona Constitution, Article 2, §2.1(A), crime victims in Arizona have a right to justice and due process. Additionally, victims have a right "[t]o have all rules governing criminal procedure . . . protect victims' rights." Ariz. Con. Article 2, §2.1(A) (11). Accordingly, when considering whether a dismissal of charges with prejudice serves the interests of justice, *see* 16.6(d), Ariz. R. Crim. Pro., the crime victim's right to justice must also be considered. The State is confident that, upon reconsideration, the Court will give all interests involved, including

the crime victims', due weight and determine that a dismissal with prejudice is not in the interests of justice.

D. Other Issues

The State previously argued several points during this litigation that the Court does not seem to have addressed in the January 18 Ruling. The Court should reconsider the Ruling in order to address these issues. During the litigation of this matter, the State previously filed several documents describing each of the issues. To avoid unnecessary repetition, the State incorporates herein by reference the State's Response to Defendant's Motion to Dismiss, the State's Memorandum Re Hearing on Motion to Remand, and the State's Response to Defendant's Motion for Review of Preliminary Hearing. Briefly, the issues raised by the State are found in four separate areas.

First, regarding the existence of a violation, the State argued there is a distinction in the law between an intrusion and a violation. The State has argued that the intrusion was not a violation of the defendant's 6th Amendment Rights. This argument is based in part on the fact that the hearing should not have been structured and styled after the case of *State v. Warner*, 150 Ariz. 123, 722 P.2d 291 (1986), and certainly the standards found in *Warner* should not have applied to this case. *Warner* was not appropriate as the basis for the hearing because that case was factually and legally distinct from the case at bar. The State argued that the recent case of *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009), was more clearly on point factually and legally than *Warner*. This Court did not address these arguments in the Ruling.

Second, regarding a *prima facie* case, the State argued that the defendant was required to make a *prima facie* case before the Court could begin to try to find a remedy for the acts of the State's investigators. The State cited to the recent case of *State v. Mieg*, 225 Ariz. 445, 239 P.3d

1258 (Ariz.App. 2010), which overturned a lower court decision after proceeding without the defense having made a *prima facie* case. The State argued throughout the litigation that the defendant had not established such a preliminary case. At the September 27 hearing, the parties and the Court engaged in a lively discussion about the issue of a *prima facie* case, saying specifically that the defendant would first be required to show he had lost confidence in all attorneys *because of the actions of the investigators*. At the following hearing, the defendant conveniently came armed with this information (as cited above in the October 11, 2010, telephone call) and he told the Court exactly what he thought needed to be said. This testimony undermined the Court's ability to fairly evaluate the true state of the relationship between the defendant and his attorney, let alone the defendant's true disposition towards attorneys in general.

Third, even without the jail tapes, the State previously argued that the defendant was not a trustworthy witness. The Court did not address the issue of the defendant's trustworthiness in the Ruling. With the jail calls, we know now that the defendant lied to the Court. The defendant is willing to say whatever it takes while in Court, as he said he did when he was in his original police interview (he said as much in the February 1, 2010, call, described above). Further, his calls are overflowing with comments about his attorney's work, reflecting his true mindset as described above. But the October 11 call shows that he knew what was at stake and what he needed to say, which he then parroted back to the Court at the next opportunity. The calls do not reflect a change in the defendant from before to after the jail visit regarding his feelings toward his lawyer or any other lawyer. It is that change that would begin to form an appropriate basis for a *prima facie* case.

Fourth, regarding the appropriate remedy, the State argued that the remedy in the *Warner*

case was based on the U.S. Supreme Court case of *U.S. v. Morrison*, 449 U.S. 361 (1981). The *Morrison* Court directs lower courts to impose a remedy appropriate for the circumstances. The State provided several cases as examples of appropriate remedies for acts more egregious than what occurred in case at bar. This Court's ruling does not address why the dismissal in this case, with prejudice, fits within the legal framework of an appropriate remedy. That framework clearly indicates that the appropriate remedy is to suppress the existence and content of the February 4 visit. Because the Ruling does not address this issue and the other issues set forth above, the Court should reconsider the Ruling to reflect consideration of all the issues attendant to the murder case before it.

E. Arguments

By any reading of the case law on the issue of defendant's relationship with his attorney, as described in earlier pleadings, the fact that there was an intrusion into the attorney-client relationship is merely a threshold question. The next question has to be the establishment of a *prima facie* case by showing that the intrusion was an actual violation of the defendant's rights. Only at that point can the Court contemplate whether to impose a remedy, and then that remedy must be appropriate to the circumstances.

Regarding the intrusion, the Court's Ruling set forth a factual finding of an intrusion into the defendant's 6th Amendment Rights. That intrusion is based on the jail visit on February 4. That visit was recorded, and the Court has heard the recording. During the entire encounter with the investigators, the defendant does not make any statements that would tend to incriminate him. However, even though there is nothing of consequence that is suppressible from that February 4 contact, case law is clear that the most severe appropriate remedy in a situation like this is to suppress the existence and content of the contact. Whether or not the contact reaped

any information does not change the fact that case law instructs us that suppression is the appropriate remedy, not dismissal with prejudice.

Regarding a violation however, the Court did not address the fact that the defendant failed to make a *prima facie* case, certainly not until he had over a year to research the legal issues, talk with his lawyer and review the evidence and he had learned in Court what he needed to say in order to achieve a dismissal. The telephone records the State has recently obtained provide crucial evidence to show the Court that the defendant's negative feelings about lawyers and the criminal justice system existed months before the jail visit by the officers. The records also show that the defendant's feelings towards his lawyer actually improved as he reaped benefits from his attorney's representation. Quite simply, the defendant lied to the Court when he testified that the acts of the officers on February 4 caused him to mistrust all lawyers. The Court should reconsider the Ruling based on this important evidence and on the fact that the defendant deliberately misled this Court to obtain a favorable ruling.

Finally, the remedy handed down by the Court is deserving of review and adjustment. Dismissal with prejudice is the most extreme remedy possible in a criminal case. Given the facts and circumstances of the underlying criminal offense, dismissal with prejudice works to deny the surviving family members of the homicide victims any recourse for justice. The defendant was in regular contact with his lawyer. He was prepared prior to the officers' visit for the consequences of not taking a plea deal, including the possibility of the death penalty. His lawyer told him virtually what the plea deal was. He continued to work with and praise his lawyer even after the February 4 visit. He parroted back to the Court exactly what was discussed in open court to ensure he said the right phrases. For these reasons, the Ruling should be reconsidered so that the surviving members of the homicide victims are not deprived of any recourse for justice.

F. Conclusion

The Court should reconsider this Ruling in light of the good cause discovered in the jail calls and to address the various issues noted above.

Submitted March 14, 2011.

**WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY**

BY 
John F. Beatty
Deputy Maricopa County Attorney

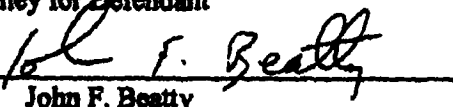
ORIGINAL mailed/delivered
March 14, 2011, to:

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FILED
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

STATE OF ARIZONA.

Plaintiff,

vs.

JOSEPH DOUGLAS ROBERTS.

Defendant.

CR 2010-00047

**STATE'S MOTION TO RECONSIDER
FINDING OF NO JURISDICTION
REGARDING MOTION TO RECONSIDER
DISMISSAL**

(Honorable Donna J. Grimsley)

The State of Arizona, by undersigned counsel, respectfully requests this Court to reconsider the Court's finding, as set forth in the minute entry of March 16, 2011, that this Court does not have jurisdiction to address the State's Motion to Reconsider Dismissal, as set forth in the Court's ruling on January 18, 2011.

Pursuant to Rule 31.11, Arizona Rules of Criminal Procedure, this Court retains jurisdiction until 15 days *after* the record on appeal has been filed. Rule 31.11 states: "No new matter, other than a petition for post-conviction relief not precluded under Rule 32.2, may be

filed in the trial court by any party to an appeal later than 15 days after the record on appeal has been filed.”

The “record on appeal” referred to in Rule 31.11 is defined in Rule 31.10, Arizona Rules of Criminal Procedure. Specifically, Rule 31.10 describes that the clerk of the Appellate Court gives Notice that all portions of the record have been received and the record is complete. It is this Notice that marks the record on appeal. As of this writing, and certainly as of March 16, 2011, when the Motion to Reconsider Dismissal was filed, the record on appeal has yet to be filed. This Court will continue to retain jurisdiction for 15 days after that record on appeal is complete and filed.

The timeframe delineated in Rule 31.11 is specifically designed to allow the trial court time to take corrective action at the trial court level. This is explained in the Comment to Rule 31.11, which is reproduced here from Westlaw:

Perfection of an appeal is delayed to give the parties an adequate opportunity to file corrective motions in the trial court. This section delays the perfection of the appeal until the due date for the first filing which directly affects the course of the appeal and which can only be decided by the appellate court--the request to file briefs. See Rule 31.12. This gives parties who appeal about the same time to file corrective motions as they had under the former rules--about 60 days--and equalizes the time for filing motions under Rule 24.2 for those who do and those who do not appeal. Formerly, an appeal was perfected upon the filing of the notice of appeal and payment of the docketing fee. [* * *]

Perfection, under this section, merely designates to what court new matters relating to the appeal must be addressed. *It does not remove the trial court's jurisdiction to decide motions filed before the cut-off date, or petitions for post-conviction relief based upon issues which are not raisable on appeal and were not raised in a post-trial motion. See Rule 24.2; 24.3; 32.1; 32.2. Thus, a Rule 24 motion which was filed before perfection may be decided by the trial court after perfection whether or not the appeal has been stayed under Rule 31.4(a).*

The phrase “15 days after the record of appeal has been filed” refers to 15 days after the date on which the parties are notified under Rule 31.10.

16A A.R.S. Rules Crim.Proc., Rule 31.11 (emphasis added).

This Court retains jurisdiction over the State's Motion to Reconsider Dismissal because the record on appeal has not been filed.

Submitted March 18, 2011.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY 
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March 18, 2011, to:

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2011 MAR 28 PM 12:52

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APACHE COUNTY SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

STATE OF ARIZONA,

Plaintiff,

vs.

JOSEPH DOUGLAS ROBERTS,

Defendant.

No. CR 2010-0047

REQUEST FOR PREPARATION OF
TRANSCRIPT FOR APPEAL

(Assigned to the Honorable
Donna J. Grimsley)

The State of Arizona, by and through undersigned counsel, hereby requests that the proceedings on September 27, 2010, which were recorded, be transcribed and included in the record on appeal. The transcript will be paid for by the Maricopa County Attorney's Office.

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Submitted March 25, 2011.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY Gerald R. Grant
GERALD R. GRANT
Deputy County Attorney

Original deposited for mailing
this 25th day of March, 2011, to:

Clerk of the Court
Apache County Superior Court
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Copy of the foregoing deposited for mailing
this 25th day of March, 2011,
to:

The Honorable Donna J. Grimsley
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